STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2014
v	No. 310259 Marquette Circuit Court
NICHOLAS FRANCIS OLGREN, Defendant-Appellant.	LC No. 11-049741-FC

Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (personal injury), and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to concurrent prison terms of 7 to 20 years for the CSC I conviction and 5 to 20 years for the home invasion conviction. We affirm.

I. FACTUAL BACKGROUND

The victim and defendant had been in a violent relationship for a little over 10 years and had a child in common. Their history included numerous alleged assaults on the victim and the child by defendant. Although some of the incidents were reported to the police, the victim testified that she was forced to recant her statements each time for various reasons. The victim and defendant split up shortly after their daughter was born, but they would still get together at times. On September 24, 2011, the night of the offense at issue on appeal here, the victim and defendant had plans to meet at a bar to discuss parenting issues. The victim went to that location; however, defendant never arrived, so the victim decided to leave. When she went home, she found defendant waiting for her on the stairs leading to her apartment. Although the victim previously agreed to allow defendant to spend the night, she testified that she changed her mind. She and defendant then went to a different bar, even though she did not want to go there. Defendant had a grip on her forearm, so she "kind of just followed suit like a sheep" because it was a "scary thing . . . if he says go, you just go." Shortly after arriving, the victim left the bar and went home while defendant remained at the bar and talked with his sister.

The victim testified that she locked the screen door before she went to sleep, but left the main door unlocked. The next thing she recalled was waking up with her hands "pinned" by defendant. She said that defendant was "inside [her] and on top of [her]" and that she "started to

say no, like what are you doing, stop." She explained that whenever she said something, defendant would "smash his head down" on hers. She said that defendant "got off" after a while and then she rolled to the floor and sat there with her knees up. She testified that there was a blood stain on the bed and that she was scared and did not know what to do. She asked defendant if she could get a drink of water and smoke a cigarette, and he said yes. While the victim was sitting in the kitchen on the floor, defendant randomly "kind of like choked" her and slammed her head against the wall without provocation. When he turned and walked away, she put on her pants, grabbed her shoes, and left. She ran down an alley to her current boyfriend's house to use his phone. After calling her mother and defendant's sister, the victim called the police. Once they arrived, the police took her statement, forced entry into her apartment, and arrested defendant.

The victim received a sexual assault examination at the hospital. The treating emergency room physician testified that the victim had bruising and tenderness on her face and neck. He explained that the pelvic examination revealed tenderness in the labia and recent bleeding from the cervix. He opined that his physical findings were consistent with the victim's report of the sexual assault.

II. SUFFICIENCY OF THE EVIDENCE

Defendant's first argument on appeal is that there was insufficient credible evidence to convict him of either offense. In support, he points to several facts calling into question the victim's credibility. We need not detail the evidence challenging the victim's credibility because "[w]e afford deference to the jury's special opportunity to weigh the evidence and assess the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008). Further, when reviewing a claim of insufficient evidence, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (internal quotation marks and citation omitted).

In order to establish CSC I pursuant to MCL 750.520b(1)(f), the prosecution must prove that: (1) the defendant engaged in sexual penetration with another person, (2) the defendant caused a personal injury to the victim, and (3) the defendant used force or coercion to accomplish the sexual penetration. "Sexual penetration" includes sexual intercourse. MCL 750.520a(r). Force or coercion includes instances where the defendant "overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(1)(f)(*i*).

The victim's testimony in this case clearly supports each of the required elements. First, she testified that defendant sexually penetrated her. The doctor who treated her following the assault testified that his examination revealed a tiny area of fresh blood on her cervix that indicated she had recently engaged in either consensual or non-consensual vaginal intercourse. The victim expressly testified that she did not have consensual sexual intercourse with defendant at that time. Second, the victim testified that she bled from her vagina for two weeks after the incident. She testified that as a result of the assault she had bruises around her eye, as well as on her face, neck, arms, and legs. This bruising was confirmed by the testimony of the treating doctor. Third, the victim reported being pinned down, head-butted multiple times, and forcibly,

vaginally penetrated. The treating doctor testified that her injuries were consistent with what she had reported. Accordingly, there was more than sufficient evidence that the victim was forcibly, sexually penetrated and suffered a personal injury at defendant's hands. Therefore, there was sufficient testimony to support defendant's conviction for CSC I.

The elements of first-degree home invasion are: (1) the defendant either breaks and enters a dwelling or enters a dwelling without permission; (2) the defendant either intends when entering to commit a felony, larceny, or assault in the dwelling or at any time while entering, present in, or exiting the dwelling commits a felony, larceny, or assault; and (3) while the defendant is entering, present in, or exiting the dwelling either is armed with a dangerous weapon or another person is lawfully present in the dwelling. MCL 750.110a(2); *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010).

The victim testified that she had initially invited defendant to stay overnight at her house because if she did not give permission they would "fight and fight and fight for hours, and then he would stay there anyway." When defendant actually showed up at her apartment, the victim changed her mind about letting him stay. She told defendant she did not think they should go in the house together because he looked intense and angry. She testified that she locked her screen door and that defendant forced it open. It was reasonable for the jury to infer that because she locked the door and did not want defendant staying with her, defendant entered her apartment by forcing the door open. And as discussed above, there was sufficient evidence that while defendant was in the apartment he sexually assaulted the victim, who was lawfully in her own apartment. Accordingly, there was sufficient evidence to support defendant's first-degree home invasion conviction.

III. EXPERT WITNESS

Defendant next argues that the trial court erred in allowing Shelly Ovink to testify as an expert witness regarding the general characteristics of domestic abuse because (1) the trial court did not first determine that her testimony would be helpful to the jury, (2) the facts and circumstances on which she based her opinion were not admitted into evidence, and (3) her testimony was speculative. By failing to object to Ovink's testimony at trial, defendant failed to preserve this issue. Therefore, our review is for plain error affecting defendant's substantial rights. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). A plain error affects a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 664-665; 821 NW2d 288 (2012).

Pursuant to MRE 702, expert testimony will be allowed as follows:

> If [the court determines that] scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant argues that the trial court failed to determine whether the proposed expert testimony would assist the jury to understand the evidence or to determine a fact in issue. Further, defendant argues that the evidence was not necessary to assist the jury. "Generally, expert testimony is needed when a witness' actions or responses are incomprehensible to average people." *People v Christel*, 449 Mich 578, 592; 537 NW2d 194 (1995).

In this case, there was testimony that the victim and defendant had a long-term, volatile relationship. Defendant's sister testified that the victim and defendant lived with her from approximately 2001 to 2003. She said that she asked them to leave because of "fighting" and "lying" and because "they were causing a lot of problems" in her own relationship. The victim testified that when she called her mother for help after the assault, her mother refused, apparently stating that she was tired of defendant and the victim fighting and "dragging their daughter through it." The jury also heard other significant testimony about previous incidents between the victim and defendant.

The victim testified that she was with defendant for a little over ten years, that they "started falling in and out" in 2006, that they had a daughter in 2007, and that four months after their daughter was born defendant "split for good, but then came back and forth, using the house for mail, or to shower, or to eat, or to just stay with his kid while [she] worked." She indicated that on August 1, 2011, she moved into an apartment with defendant. She agreed that she testified at the preliminary examination that she wanted defendant out of the apartment, but that she could not get him out and she was afraid of calling the police because she did not want to die. She agreed that in spite of being afraid he was going to kill her, she still lived with him for four weeks and had sexual intercourse with him. She testified that the sex "wasn't consensual, nor was it forced" because "[h]e wanted it, I didn't. I didn't want to get beat up, so I gave . . . in." She said that she was "relieved that he left" but was not "greatly" relieved because she knew that their daughter was "going to be without a dad again." She also admitted sending a message to a friend on September 11, 2011, stating: "If you see [defendant] today, tell him I'm sorry. I really need to talk to him. He was living here for four weeks, then up and leaves, when I have no food, phone or cash. Convenient for him, but not too much for me. I wish he wasn't so hot-headed and temperamental."

Ovink testified about concepts that are present in many domestic violence relationships, including a power and control model; victimology; cycles of violence; reasons that a victim would stay in a violent relationship; reasons to report assaults; the effect mental health history can have on the situation; whether domestic abuse can cause posttraumatic stress disorder; the effect a child in common can have on the relationship; why people go back to an abusive relationship after leaving once; and how alcohol and drug abuse would affect the situation. Given the testimony about the dynamics of the victim's relationship with defendant, Ovink's testimony could help the jury understand the evidence presented about their unpredictable and sometimes explosive relationship.

Defendant argues that Ovink's testimony was speculative because she did not examine the facts of this case. Ovink did not testify one way or the other as to whether she independently examined the facts of this case. However, Ovink testified that she had listened to some of the testimony at trial, commenting that it "was kind of already looking [like] . . . the cycle of violence going on here." After explaining that some victims did not leave an abuser because

they feared people knowing things about them, she tied this characteristic to the evidence: "I think I heard a little bit of that today, the kind of, you know, I don't really want to report this, I don't want to come to court, I don't want everyone knowing my business." She then added, "There's a fear of—And again, I heard this one today, too, a little bit of that mental health history."

To the extent that she testified about what she "saw" in court in relation to her testimony about domestic violence relationships in general, her testimony was improper. In *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857, amended on other grounds 450 Mich 1212 (1995), our Supreme Court held that, subject to the exclusionary rule in MRE 403, it was proper for an expert to testify "regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim's credibility." (Emphasis in original.) Further, "[t]he prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case." *Id*. Generally, however, "an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child" because it would come "too close to testifying that the particular child is a victim of sexual abuse." *Id*. at 374. Here, Ovink's testimony was too close to testifying that the victim's behavior was consistent with that of a victim of domestic abuse. As such, the testimony was improperly admitted.

Nonetheless, the error was harmless. In *Christel*, our Supreme Court determined that even though irrelevant expert testimony about battered woman syndrome had been admitted, the error was harmless because of (1) the other physical evidence of abuse, (2) the victim's testimony, and (3) the limited nature of the expert's offering, i.e., he testified generally about battered woman syndrome without opining about whether the victim's behavior was consistent and without opining whether she was truthful or whether she was a battered woman. *Christel*, 449 Mich at 598-599.[1] In this case, independent of Ovink's testimony, there was sufficient evidence to convict defendant of both crimes based on the victim's testimony; the responding police officers' testimony; the treating medical personnel's testimony; the lead investigator's testimony; the physical findings at the scene; the medical examination; and all of the other significant testimony about the history of the volatile domestic relationship between defendant and the victim.

Further, the trial court instructed the jury that they did not have to believe Ovink's testimony even though she was an expert and that when deciding whether to believe her they should "think carefully about the reasons and facts she gave for her opinion, and whether those facts are true." The court also indicated that they should "think about [her] qualifications, and whether her opinion makes sense when you think about the other evidence in the case." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229

[1] *Christel* applied similar principles to expert testimony about battered woman syndrome. See *Christel*, 449 Mich at 580.

(1998).

IV. PRODUCTION OF PRIVILEGED RECORDS

Defendant requested that the trial court either conduct an in camera inspection of or issue a subpoena requiring the production of the victim's psychiatric records because he believed they could contain evidence that the victim was not credible. In support, defendant noted that the victim's preliminary examination testimony and various police reports revealed that the victim (1) had an extensive mental health history, (2) did not always take her prescription medications, (3) sometimes self-medicated with non-prescription controlled substances, (4) abused alcohol, (5) previously fabricated similar complaints of abuse against defendant and then essentially recanted her statements, (6) was involuntarily committed to the adult psychiatric ward of the hospital several times, (7) was sometimes violent and angry, and (8) sometimes suffered "blackouts" where she did not remember what happened. The trial court refused to conduct an in camera inspection, finding that defendant had failed to meet the requirements of MCR 6.201(C) (allowing discovery of privileged records). Defendant argues that the decision was in error because it denied him his constitutional right to present a defense and because he presented sufficient evidence to satisfy the court rule.

We review the trial court's decision to conduct or deny an in camera review of records in a criminal case for an abuse of discretion. *People v Stanaway*, 446 Mich 643, 680, 682; 521 NW2d 557 (1994). A court "abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). "[W]e review de novo the question whether a defendant was denied the constitutional right to present a defense." *Unger*, 278 Mich App at 247.

The trial court held that defendant's "facts" were insufficient to meet the threshold showing required to allow an in camera inspection of the psychiatric records. Although the court acknowledged that the victim's credibility was likely to be directly at issue at trial, the court found that the mere existence of an extensive mental health history did not necessarily mean that psychiatric records should be available for an in camera inspection. Further, the court noted that, independent of the privileged information and records, defendant appeared to have information about the victim's prior issues with intoxication, alleged blackouts, history of allegations against defendant, inability to recall events, and her history of obtaining injuries from something or someone other than defendant and then blaming defendant for those injuries.

It is well-established that a "criminal defendant has a state and federal constitutional right to present a defense." *Unger*, 278 Mich App at 250 (internal quotation marks and citation omitted). "However, an accused's right to present evidence in his defense is not absolute." *Id*. In appropriate cases, the defendant's right must "bow to accommodate other legitimate interests in the criminal trial process," including Michigan's "legitimate interest in promulgating and implementing its own rules concerning the conduct of trials." *Id*. (internal quotation marks and citation omitted). "Our state has 'broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." ' " *Id*., quoting *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998), quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37

(1987). If a criminal defendant fails to present any argument that a particular rule of evidence is arbitrary or disproportionate to the purposes it is designed to serve, either in general or as applied to the facts in his or her case, then the failure to properly address the merits of the assertion constitutes abandonment of the issue. *People v King*, 297 Mich App 465, 474; 824 NW2d 258 (2012).

Defendant never argues that the rule limiting access to privileged records is arbitrary or disproportionate to the purpose it is designed to serve. Instead, while defendant presents arguments that the trial court misapplied the rule from *Stanaway*, 446 Mich at 677 and MCR 6.201(C)(2), he also argues that the right to present a defense is "not unlike the right to confront accusers which is so critical that, when it comes in conflict with a state evidentiary rule, the state rule must give way to the constitutional guarantee." In support, he cites *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973), and, without a pinpoint citation, *Davis v Alaska*, 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974).

In *Chambers*, the United States Supreme Court noted that the right to "confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 US at 294. However, the Court also stated that "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. at 295. In *Davis*, the Court held that the defendant was denied his constitutional right to confront a witness when the trial court limited cross-examination regarding the witness's juvenile record in accord with the state's policy interest in protecting the identity of juvenile offenders. *Davis*, 415 US at 318-320. The Court did not hold, however, that whenever the right to confront an accuser came into conflict with a state evidentiary rule that the state evidentiary rule must give way to the constitutional guarantee.

At its essence, this is an evidentiary issue. The parties do not dispute that the psychiatric records contain privileged information. See MCL 330.1750. Further, it is well-established that generally "there is no right to discover information or evidence that is protected from disclosure by . . . privilege." MCR 6.201(C)(1). In *Stanaway*, 446 Mich at 649-650, our Supreme Court balanced the opposing interests of protecting the confidentiality of privileged records with a criminal defendant's right to obtain evidence necessary to his defense. The Court held, however, that "where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense." *Id*. The Court held that a defendant's "generalized assertion of a need to attack the credibility of his accuser did not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id*. at 650. The defendant in *Stanaway* asserted that privileged records "might contain inconsistent statements or might lead to exculpatory evidence, but admitted that he had no basis for a good-faith belief that it was probable such information would be found." *Id*. at 651. On those facts, the Court held that the

trial court had not abused its discretion in denying the defendant's request for privileged information. *Id*. at 681-682.[2]

Defendant asserts that the following evidence required the court to, at a minimum, inspect the records in camera. First, at the preliminary examination, the victim testified that she had an extensive mental health history, including diagnoses of bipolar disorder, anxiety disorder, and major depressive disorder with suicidal ideation. There was also evidence that she does not actually believe she suffers from the disorders with which she was diagnosed. Second, there is evidence that she self-medicates, using non-prescribed, controlled substances and alcohol. Third, police reports reveal a history of similar allegations by the victim against defendant. The police reports also demonstrate that she either had blackouts where she could not remember what happened or she was outright lying about the prior allegations against defendant. The police reports also recounted that the victim was violent, even resisting arrest while shackled in the back of a police car. Finally, defendant argues, there was evidence from police reports and the victim's admissions that she had been involuntarily committed to the adult psychiatric unit of a hospital on several occasions. Based on the foregoing, defendant asserts that the trial court should have conducted an in camera review of the psychiatric records because it is highly probable that they will contain information bearing on the victim's credibility.

Defendant has not shown that the trial court abused its discretion because the facts articulated did not demonstrate that there was a reasonable probability that the records contained material information necessary to the defense. Evidence is material to the defense only if the defendant's lack of access to the records undermined the verdict, meaning that with access to the records it is reasonably probable that the result would have been different. *Fink*, 456 Mich at 458-459. The materiality of the suppressed evidence is lessened if it is not significant new information or if a witness testified about the information at trial. *Id*. at 459-460. Here, the trial court correctly recognized that it was possible that information about the victim's mental health diagnoses, prior intoxication and drug use, alleged blackouts, prior allegations against defendant, and prior injuries that she falsely attributed to defendant could be put before the jury without resorting to the privileged psychiatric records. Indeed, all of the information was produced at trial on cross-examination and defendant's closing argument focused heavily on the victim's credibility in light of the foregoing circumstances. Further, defendant has only stated generally that he believes there might be relevant impeachment evidence in the records because the records

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[2] Our Supreme Court amended MCR 6.201(C) to reflect its decision in *Stanaway*. See *People v Fink*, 456 Mich 449, 455 n 7; 574 NW2d 28 (1998). MCR 6.201(C)(2) provides in pertinent part:

> If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

exist and the victim has the aforementioned history. He must specify something more than general information attacking a witness's credibility. *Stanaway*, 446 Mich at 650.

In sum, the trial court did not abuse its discretion in declining to order the production or conduct an in camera inspection of the victim's privileged psychiatric records. Defendant was not denied the right to present a defense.

V. EVIDENTIARY DECISIONS

Defendant next challenges two evidentiary decisions the court made at trial. We review this challenge for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), which occurs when the court chooses a result that is outside the range of reasonable and principled outcomes, *Orr*, 275 Mich App at 588-589. An evidentiary error does not merit reversal in a criminal case "unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496, quoting MCL 769.26. Unpreserved errors are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

Generally relevant evidence is admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence may be excluded if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Defendant argues that the trial court should have admitted testimony from his sister regarding "fighting" and "lying," apparently between defendant and the victim when they lived with her from about 2001 to 2003. Defendant offered no proof regarding how his sister would have testified. However, from the context, it does not appear that she was going to testify that when the victim was at her house she routinely, falsely accused defendant of injuring her whenever she sustained an injury. Further, it is unclear to this Court whether the alleged "fights" were verbal, physical, or even mutual. There is a similar lack of information about the "lying" that was allegedly taking place. Without substantial context regarding the alleged lying and fighting, this is quite simply character evidence.

Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." MRE 404(a). However, because it was likely intended to impeach the victim's credibility, it was arguably admissible under the exception to the general rule prohibiting character evidence. See MRE 404(a)(2); MRE 607. The evidence was undoubtedly relevant to some extent because issues regarding the credibility of a witness are almost always relevant. *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281 (2001).

However, as noted above, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, the trial court essentially determined that the probative value of the evidence was minimal because of

"remoteness," i.e., the witness was testifying about events that occurred from "[a]pproximately 2001 to 2003-ish." We agree and conclude that the trial court did not abuse its discretion in excluding the testimony.

Next, defendant argues that the trial court erred in excluding testimony from the treating emergency room physician regarding whether the victim told him she had been involuntarily committed to the adult psychiatric ward of the hospital. The prosecutor's objection was sustained because the trial court determined that the testimony was irrelevant to the doctor's testimony and outside the scope of the direct examination. On appeal, defendant appears to argue that the testimony should have been admitted pursuant to the rule of completeness. See MRE 106. Because defendant did not raise the rule of completeness before the trial court, our review is for plain error affecting defendant's substantial rights. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994); *Carines*, 460 Mich at 763-765.

The treating physician testified that he did not believe he asked the victim about her mental health or psychiatric history. Accordingly, the record does not even establish that the alleged statement was made. Without some indication that the statement defendant is trying to introduce even exists, the court cannot be deemed to have committed any error, let alone plain error.

VI. MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE

Finally, defendant argues that the trial court abused its discretion in denying his motion for a new trial based on newly discovered evidence. "Whether to grant a new trial on the basis of recanting testimony is a decision committed to trial court discretion" and is reviewed for an abuse of discretion. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). "In reviewing the trial court's decision, due regard must be given to the trial court's superior opportunity to appraise the credibility of the recanting witness and other trial witnesses." *Id*.

Generally "motions for a new trial on the ground of newly-discovered evidence are looked upon with disfavor." *People v Rao*, 491 Mich 271, 279-280; 815 NW2d 105 (2012).

> A motion for a new trial based on newly discovered evidence may be granted upon a showing that: (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. [*Canter*, 197 Mich App at 559.]

"[I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test . . . " *People v Grissom*, 492 Mich 296, 319; 821 NW2d 50 (2012).

> Newly discovered impeachment evidence concerning immaterial or collateral matters cannot satisfy [the four-part test]. But if it has an exculpatory connection to testimony concerning a material matter and a different result is probable, a new trial is warranted. It is not necessary that the evidence contradict specific testimony at trial. [*Grissom*, 492 Mich at 321.]

The defendant bears the burden of establishing all four parts of the test. *Rao*, 491 Mich at 289. In this case, defendant asserts that the victim recanted her trial testimony. "[W]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy." *Canter*, 197 Mich App at 559.

On July 30, 2012, the victim wrote a letter to defendant's appellate defense counsel in which she stated, "I thought I was dreaming but I wasn't when [defendant] got home and laid down I opened my eyes and said 'Where have you been all night Hon!' " She also wrote that "7-20 years in prison for a crime he did not commit is unfair." She also stated that defendant "has never done anything to me. Not to get 7-20 years in prison."

Although the letter arguably contained statements recanting or calling into doubt the victim's trial testimony, the subsequent evidentiary hearing clarified that she was not recanting her testimony. She said that she "absolutely" told the truth when she testified before the jury. Based on the victim's demeanor while testifying at the hearing, the trial court found that her testimony was "credible and truthful." The court found that although the letter to defense appellate counsel facially appeared to be a recantation of her testimony, when looking at the letter in context and coupled with her testimony at the evidentiary hearing, "it is not so much a recantation of the acts and events that occurred that night, but it is an expression of understandable regret that, as a result of all that occurred, the father of . . . [her] daughter, is now spending time in prison." The court did not find the victim's testimony "any different today than during the trial, both as to the elements of first degree CSC, as well as the element[s] of home invasion." Accordingly, the trial court's denial of the motion for new trial was not outside the range of principled outcomes.

Affirmed.

/s/ Jane M. Beckering
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra